IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARY BUTLER — PLAINTIFF

v. — Civil Action No. 1:96cv349-D-D

CMC MISSISSIPPI, INC. — DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the Defendant CMC Mississippi, Inc., for summary judgment as to the claims of the Plaintiff Mary Butler.[1] Upon consideration of the submissions of the parties, this court finds the motion not well-taken and shall deny it.

. Factual and Procedural Background

The Defendant CMC Mississippi, Inc., (CMC) manufactures high technology products. Prior to 1994, CMC primarily manufactured telephones and telephone-related products. Due to market conditions, CMC redirected its manufacturing operations in 1994. It began to produce a wider variety of high technology products and to change its primary manufacturing process from a "through hole" process to a process involving "surface mount technology" (SMT).

The Plaintiff Mary Butler (Ms. Butler) worked for CMC and its predecessors from 1973 to 1995. During that time, Ms. Butler worked on various products, including telephones, telephone switching units, modem boards, PC boards and credit cards, and she worked in various capacities, including operator, inspector, quality auditor and tester. At the time CMC terminated her employment, Ms. Butler held the position of "method technician."

In late 1994 or early 1995, CMC created the method technician position and instructed David Throop, Director of Engineering, to hire and train the method technicians. Mr. Throop promoted Ms. Butler to that position in February of 1995. Ms. Throop determined that Ms. Butler should replace Tammy Fowler (age 26), who was serving as a method technician and

[1]Originally Ms. Butler joined with another plaintiff, Mary Trammel, in filing this action. However, by order dated February 23, 1998, this court dismissed with prejudice Ms. Trammel's claims against CMC Mississippi, Inc., upon stipulation of the parties. Trammel v. CMC Mississippi, Inc., Civil Action No. 1:96cv349-D-D (N.D. Miss. Feb. 23, 1998).

desired to transfer to another department within the company. However, when another method technician position opened under Mr. Throop, Ms. Fowler decided to remain at the position along with Ms. Butler. Subsequently, Ms. Fowler was promoted to the Information Systems Department. Mr. Throop hired Rita Dickey to replace Ms. Fowler as method technician.

In late August or early September 1995, CMC instructed its managers to reduce the workforce. At that time, four method technicians worked under Mr. Throop: Carla Chapman (age 27), Martha Worley (age 38), Ms. Dickey (age 42), and Ms. Butler (age 53). Mr. Throop determined that he could reduce the number of method technicians from four to three. Mr. Throop chose to terminate Ms. Dickey's employment because she had been hired most recently and "little training time or expense had been spent on her." Defendant's Statement of Undisputed Material Facts, ¶ 32; see also Plaintiff's Response to Defendant's Statement of "Undisputed Material Facts" (admitting ¶ 32 of Defendant's Statement). During the reduction in force (RIF), when one department terminated an employee, the employee's former department was given the opportunity to absorb that employee. Ms. Dickey's former department at CMC absorbed her, so she remained an employee of CMC.

In the Information Systems Department, Ms. Fowler was selected for removal under the RIF. Mr. Throop decided to absorb Ms. Fowler as one of his three method technicians. To make room for Ms. Fowler, Mr. Throop terminated Ms. Butler's employment with CMC. The termination occurred on September 8, 1995, at which time Ms. Butler was 53 years old. None of Ms. Butler's former departments absorbed her.

Ms. Butler has sued CMC arguing that the termination of her employment amounted to an unlawful employment practice under the Age Discrimination of Employment Act (ADEA). Now CMC moves this court for summary judgment as to her claim.

II. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir.1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or

would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

III. Discussion

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The burdens of production and persuasion in an employment discrimination case such as this ADEA case are well-known:

> Absent direct evidence, the plaintiff can create a rebuttable presumption of discrimination by presenting a *prima facie* case. . . . Once a plaintiff demonstrates a *prima facie* case, the burden of production shifts to the defendant to establish a legitimate, nondiscriminatory reason for its decision. Once defendant meets this burden [which is a burden of production only], the presumption dissolves and the plaintiff must prove by a preponderance of the evidence that the employer's articulated reason is but a pretext for age discrimination.

Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 149 (5th Cir. 1995); see also Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L. ed. 2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Under the ADEA, a plaintiff may raise a *prima facie* case by showing (1) she was discharged; (2) she was qualified for the position; (3) she was within the protected class; and (4) she was (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of her age. Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993). The plaintiff may overcome a motion for summary judgment "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which the plaintiff complains." Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996).

Regarding the *prima facie* case, clearly Ms. Butler satisfies the first two elements. Indeed, CMC admits them, stating "it is undisputed that in Spring 1995, Plaintiff was in the protected age group (she was 53) and that CMC discharged the Plaintiff." Memorandum in Support of Motion for Summary Judgment, p. 9. Further, considering the evidence before the

court, Ms. Butler clearly raises a genuine issue as to the third element of her *prima facie* case, that she was qualified for the position of method technician. CMC states that Ms. Butler received a rating of 57 out of 100 possible points on her performance appraisal. The Performance Appraisal form which CMC offers into evidence reveals that a score of 57 is a "good" score; that is, Ms. Butler received a score of "good" in every factor of her performance appraisal. Defendant's Motion for Summary Judgment, exhibit 6. Lastly, Ms. Butler satisfies the fourth element of her *prima facie* case. Even CMC admits that it replaced Ms. Butler with Ms. Fowler, who at age 26 was a person outside the protected class. Defendant's Statement of Undisputed Material Facts, ¶¶ 34-38. Therefore, Ms. Butler raises a genuine issue as to each element of her *prima facie* case.

Incidentally, CMC posits that the elements of Ms. Butler's *prima facie* case are the following: "(1) she was in the age group protected by the ADEA; (2) she was qualified to assume another position at the time of discharge; (3) she was discharged; and (4) direct or circumstantial evidence exists from which a factfinder might reasonable conclude that CMC intended to discriminate in its decision." Defendant's Memorandum in Support of Motion for Summary Judgment, pp. 8, 9. The primary Fifth Circuit opinion which CMC cites in stating these elements is a RIF case. That is, it is a case where an employer terminated an employee's employment in an effort to reduce its workforce. See Woodhouse v. Magnolia Hosp., 92 F.3d 248, 252 (5th Cir. 1996). In that case, the Fifth Circuit stated, "*In a RIF case*, a *prima facie* case is established by evidence that (1) the plaintiff is within the protected age group under the ADEA; (2) he or she was adversely affected by the employer's decision; (3) he or she was qualified to assume another position at the time of the discharge or demotion; and (4) evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision." Woodhouse, 92 F.3d at 252 (emphasis added). The case at bar, on the other hand, is not a RIF case. To be sure, CMC was undergoing a RIF when it terminated Ms. Butler's employment. Further, the RIF termination of

Ms. Fowler from the Information Systems Department led to the termination of Ms. Butler's employment. However, CMC did not terminate Ms. Butler's employment in an effort to reduce its workforce. Instead, CMC terminated Ms. Butler because it wished another individual, Ms. Fowler, to have Ms. Butler's position. Therefore, Ms. Butler's case is not a RIF case. It is a replacement case. See Armendariz, 58 F.3d at 149 (distinguishing between replacement cases and "job elimination" cases). Therefore, the *prima facie* elements in Woodhouse, which the Fifth Circuit designed specifically for that RIF case, are not the elements facing Ms. Butler. Indeed, since the McDonnel Douglas framework is a flexible mechanism, what constitutes a *prima facie* case can vary with any set of facts. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 n.13, 93 S.Ct. 1817, 1824 n.13, 36 L.Ed.2d 668 (1973). Likewise, a RIF case like Woodhouse may provide general rules of employment discrimination law applicable to a replacement case such as this one. However, any rule of law specifically governing RIF cases is not applicable here.

That aside, this court returns to the point that Ms. Butler has raised a genuine issue of material fact regarding each element of her *prima facie* case. Therefore, Ms. Butler has raised a rebuttable presumption of age discrimination. To rebut this presumption, CMC must produce a legitimate, nondiscriminatory reason for terminating Ms. Butler's employment. CMC proffers four such reasons: (1) CMC lost approximately $1 million in fiscal 1995 and was forced to cut overhead costs by reducing its workforce; (2) Ms. Butler's experience was primarily based in telephone related production and documentation, and CMC was curtailing the production of telephones; (3) Ms. Fowler possessed more computer skills than Ms. Butler; and (4) Ms. Fowler, as well as the other method technicians Ms. Chapman and Ms. Worley, possessed more experience with SMT documentation than Ms. Butler. In stating these reasons, CMC satisfies its burden of production, and the presumption of age discrimination dissolves.

Now, to overcome summary judgment, Ms. Butler must show that the evidence taken as a whole (1) creates a fact issue as to whether each of CMC's stated reasons was what actually

motivated CMC and (2) creates a reasonable inference that age was a determinative factor in the actions of which Ms. Butler complains. Substantial evidence that each of CMC's proffered reasons is false may support the reasonable inference of age discrimination. See Rhodes, 75 F.3d at 994 (" A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false."); see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993) ("[R]ejection of the defendant's proffered reasons[] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . ."). This court will address each of CMC's proffered reasons in turn.

The first reason CMC proffers for terminating Ms. Butler's employment is that it lost approximately $1 million in fiscal 1995 and was forced to cut overhead costs by reducing its workforce. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 6; Declaration of Mark M. Ivey, ¶ 6. "[A] reduction in force[] is itself a legitimate, nondiscriminatory reason for discharge . . . ." Equal Employment Opportunity Comm'n v. Texas Instruments Inc., 100 F.3d 1173, 1181 (5th Cir. 1996). The problem here, though, is that substantial evidence shows that the reason is not true. Even CMC admits that it terminated Ms. Butler's employment not because it was eliminating her position to save overhead costs, but because it preferred another individual, Ms. Fowler, to work in her position. Defendant's Statement of Undisputed Material Facts, ¶¶ 34-38. The termination of Ms. Butler's employment took place during a RIF. However, that termination was not itself an effort to further the RIF. In sum, substantial evidence shows that the first proffered reason is false.

The second reason CMC proffers for terminating Ms. Butler's employment is that Ms. Butler's experience was primarily based in the production and documentation of telephone-related products and that telephone production was being "substantially curtailed" in 1995. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 6; Defendant's Statement of Undisputed Material Facts, ¶ 37. In response, Ms. Butler states that her experience encompassed not only telephone-related products, but also personal computers, PC boards and

credit cards. Deposition of Mary Butler, p. 29. Corroborating Ms. Butler's position, Mr. Throop states that Ms. Butler worked with products other than those which were related to telephones. Deposition of David B. Throop, p. 30. Of course, CMC only maintains that Ms. Butler's experience was "primarily" based in telephones. However, considering her experience in non-telephone-related products, as well as the fact that telephone sales constitute up to 20% of CMC's annual sales, a reasonable fact finder could conclude that CMC's reasoning here is pretextual. See Deposition of Mark M. Ivey, pp. 6, 7. This court also notes that Ms. Butler worked for CMC over twenty years, which is a substantial period of time. Therefore, even though a large percentage of her experience might be in telephone-related products, the remaining percentage might constitute a significant amount of experience in non-telephone-related products. Accordingly, there is substantial evidence that the second reason CMC proffers is false.

The third reason CMC proffers for terminating Ms. Butler's employment is that Ms. Fowler, as well as Ms. Chapman, possessed more computer skills than Ms. Butler. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 6; Defendant's Statement of Undisputed Material Facts, ¶¶ 36, 47. Ms. Butler responds that the only computer skill required of a method technician is the ability to enter data into a computer database, so CMC's emphasis on "computer skills" is misleading. Brief in Opposition to Defendant's Motion for Summary Judgment, unnumbered p. 13 ("The computer skills 'issue' is a non-issue."). To support this argument, she points to the deposition of Mr. Throop, who stated that the computer skill required of a method technician is data entry:

> . Okay. So basically, then the role of the computer for the method tech is data entry?
> . Absolutely. . . .
> . And the — so the method techs would go out there and basically gather the information, and then bring it back, and then enter it into blanks on this template?
> . A lot of the generic information, such as the assembly numbers, who the engineer was, the method tech, the operation codes, all of that . . . . So it's very product-specific information. And that's where the engineers and the programmers, the process technicians fed information to the method techs

on the specifics.
. And then, basically, it would be a matter of typing that information in?
. Typing that information into the system.

Deposition of David Throop, pp. 32-33. A reasonable fact finder might conclude that CMC is being disingenuous when it emphasizes Ms. Butler's relative lack of "computer skills" when in fact the only computer skill required of a method technician is essentially the ability to type. In other words, there is substantial evidence that the third proffered reason is false.

The fourth reason CMC proffers for terminating Ms. Butler's employment is that Ms. Fowler, as well as Ms. Chapman and Ms. Worley, possessed more experience with SMT documentation than Ms. Butler. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 6. In response, Ms. Butler lists a number of SMT projects on which she worked at CMC. Deposition of Mary Butler, pp. 31, 38, 33-38, 43-44. Ms. Butler also explains that, if she does not have great experience with SMT documentation, it is only because CMC only recently entered the SMT market. Deposition of Mary Butler, p. 33-34. Corroborating Ms. Butler's statement, Mr. Ivey explains that the SMT manufacturing process is state-of-the-art and that only in 1994 did CMC change directions to become a SMT contract manufacturer. Declaration of Mark M. Ivey, ¶ 2. Of course, CMC does not argue that Ms. Butler had no experience with SMT, but only that she had less SMT experience than the other method technicians. However, considering CMC's recent entry into the SMT market, a reasonable fact finder might have difficulty believing that the other method technicians had the time to gain an upper hand on Ms. Butler in SMT experience, especially considering all the work Ms. Butler did on SMT after 1994. There is substantial evidence that the fourth reason CMC proffers is false.

In sum, it is this court's opinion that the evidence taken as a whole creates a fact issue as to whether each of CMC's stated reasons was what actually motivated CMC. It is also this court's opinion that, from the substantial evidence that the stated reasons were false, a reasonable

fact finder could infer discriminatory intent relative to Ms. Butler's age.[2] Therefore, this court finds CMC's motion for summary judgment not well-taken and shall deny it.

IV. Conclusion

CMC does not show that Ms. Butler has failed to raise a genuine issue as to a material fact in this case. Ms. Butler offers this court evidence which taken as a whole creates a fact issue as to whether each of CMC's stated reasons was what actually motivated CMC. Further, from the substantial evidence that the stated reasons were false, a reasonable fact finder could infer discriminatory intent relative to Ms. Butler's age. This court finds CMC's motion for summary judgment not well-taken and shall deny it. In doing so, this court notes that it has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the record for the trier of fact. Kunin v. Feofanov, 69 F.3d 59, 61 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Servs., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).

An separate order in accordance with this opinion shall issue this day.

This the ___ day of March 1998.

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United States District Court

[2]CMC argues that an inference of no discrimination arises here because the same person, Mr. Throop, hired and fired Ms. Butler. See Faruki v. Parsons, 123 F.3d 315, 320 n.3 (5th Cir. 1997) ("Where, as here, the same actor hires and fires an employee, an inference that discrimination was not the employer's motive in terminating the employee is created."); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir.1996) (discussing "'same actor' inference"). This court refuses to extend the "'same actor' inference" to the case at bar. CMC's argument that Mr. Throop "hired" Ms. Butler in February 1995 is misleading. CMC's predecessor hired Ms. Butler in 1973. In February 1995, Mr. Throop only promoted Ms. Butler from another position at CMC. Further, assuming *arguendo* that the inference applies here, it is this court's opinion that Ms. Butler rebuts the inference with the evidence she offers this court regarding pretext and age discrimination.

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MARY BUTLER — PLAINTIFF

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CMC MISSISSIPPI, INC. — DEFENDANT

ORDER
GRANTING MOTION TO AMEND MOTION FOR SUMMARY JUDGMENT
AND DENYING MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED that:

(1) the motion of the Defendant to amend its motion for summary judgment is hereby GRANTED; and

(2) the motion of the Defendant for summary judgment as to the claims of the Plaintiff Mary Butler is hereby DENIED.

SO ORDERED, this the ____ day of March 1998.

_____
United States District Court